UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EXPRESS SCRIPTS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 17-CV-01423-HEA
	)	
SAMUEL J. LAVIN, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Plaintiff Express Scripts, Inc. ("ESI"), by its undersigned counsel, submits this memorandum of law in support of its Verified Complaint and motions for temporary and preliminary injunctive relief against Defendants Samuel J. Lavin ("Lavin") and Ocean Drug, Inc. d/b/a MDR Pharmaceutical Care ("MDR").

I. NECESSITY OF IMMEDIATE INJUNCTIVE RELIEF

ESI brings this action against its former employee, Lavin, and his current employer, MDR, seeking injunctive relief and damages to redress the breach of Lavin's Nondisclosure, Nonsolicitation and Noncompetition Agreement ("Agreement"), and both Defendants' use and misappropriation of ESI's confidential and proprietary information and trade secrets.

While employed by ESI, Lavin worked in a high-level sales position within ESI's Freedom Fertility business unit, which provides specialty pharmacy services to fertility clinics. In that role, ESI granted Lavin access to its highly-sensitive confidential and proprietary information and trade secrets. This information includes, but is not limited to: the names of and specific contacts at ESI's customers and potential customers; contracts between ESI and its customers, along with the terms of those contracts and the reimbursement schedules and rates for such contracts; customer feedback and opinions (positive and negative) with respect to ESI's products and services, as well as their contract history and status; the pricing of ESI's products; marketing plans; and new products in development.

Allowing Lavin to use this confidential information for the benefit of MDR, a direct competitor with ESI in the specialty pharmacy business in the fertility area, provides MDR with an unfair competitive advantage, and would allow Lavin to unlawfully compete with ESI. Additionally, to allow such conduct would fly directly in the face of the clear, reasonable, and valid Agreement that Lavin voluntarily signed, wherein he agreed not to compete with ESI for a one-year period following the end of his employment.

If Lavin is allowed to simply ignore the terms of his Agreement, not only will ESI suffer irreparable harm caused by his conduct, ESI has an increased risk that other key members of its high-level sales team will ignore their valid agreements with ESI, imperiling its hard-earned ability to compete and protect its confidential and proprietary information and trade secrets in the fast-paced specialty pharmacy services industry. As such, this Court should put an end to Lavin's direct attempt to violate his clear contractual Agreement with ESI, and to MDR's attempt to both interfere with ESI's contractual rights and to unlawfully employ Lavin in an effort to gain ESI's confidential information, including but not limited to, ESI's confidential customer information, contacts and goodwill.

Accordingly, a temporary restraining order and preliminary injunction should be entered that: prohibit Defendants from use or disclosure of ESI's confidential information and trade secrets; require them to return all such information and trade secrets to ESI; prohibit Lavin from working for or on behalf of MDR in violation of his Agreement; and prohibit MDR from continuing to employ Lavin in violation of the Agreement.

II. SUMMARY OF THE FACTS[1]

1. Lavin began working at ESI in 2001. In 2009, he was promoted to the position of Director-Sales, which he referred to as National Sales Director, in the Freedom Fertility unit of ESI. (Ver. Complt. ¶¶ 20-21)

2. Lavin has created, contributed to the creation of, and been privy to a host of confidential information and trade secrets, including: the names of and specific contacts at ESI's customers and potential customers; all contracts between ESI and its customers, along with the terms of those contracts; customer feedback and opinions (positive and negative) with respect to ESI's products and services, as well as their contract history and status; marketing plans, including new products in development; and the pricing and profit margins of ESI's products. Such confidential information is not shared by ESI publicly. Moreover, Lavin personally managed or had oversight of every fertility account of ESI's in the country. At the time of his resignation, Lavin personally managed or had oversight of the following accounts: Shady Grove Fertility Center, Reproductive Medicine Associates NY, Center for Reproductive Medicine & Infertility/Cornell Institute for Reproductive Medicine, and Fertility Centers of Illinois, to name just a few. (Ver. Complt. ¶¶ 23-27)

3. The information possessed by Lavin is highly confidential and provides independent economic value to ESI from having it remain unknown outside ESI. Conversely, its competitors, such as MDR, would profit at ESI's expense from knowing such information and trade secrets. For example, MDR could undercut ESI in bidding for contracts; MDR could save valuable time and resources in the development of its own contractual terms and conditions and processes were it able simply to pick and choose from the terms and conditions and processes

[1] The supporting facts, summarized herein, are set forth in the Verified Complaint, cited to as "Ver. Complt. ¶__").

used by ESI; MDR could target clients with which ESI is most vulnerable; and MDR could begin to develop competing products and services in the areas that ESI is about to launch, but which MDR may not yet be aware of, threatening ESI's loss of the benefit from what it believes may be its early entry into the market. (Ver. Complt. ¶¶ 29, 33-34)

4. ESI takes reasonable measures to safeguard this information, including requiring repeated execution of non-disclosure agreements, generally requiring password-protected access to and "confidential" legends on documents, and monitoring external e-mails and document transfers. For example, ESI requires employees to sign nondisclosure, nonsolicitation and noncompetition agreements, as Lavin did. (Ver. Complt. ¶¶ 30-32)

5. Moreover, the position that Lavin has apparently taken with MDR, ESI's direct competitor in the specialty pharmacy fertility business,[2] involves functions and responsibilities that directly overlap with those Lavin performed for ESI. (Ver. Complt. ¶¶ 23-27, 50-52, and Exs. 2-3)

6. Given Lavin's possession and knowledge of trade secret and confidential information, and the overlap in responsibilities that he is to perform at MDR with those he performed at ESI, necessarily requiring the use of ESI's confidential information and trade secrets, Lavin cannot work at MDR. (Ver. Complt. ¶ 23-27, 41-44) Were he permitted to do so, not only would he use and disclose ESI's confidential information and trade secrets, but he also would be in direct violation of the contractual obligations to ESI. (Complt. ¶¶ 49-52, and Ex. 1)

III. ARGUMENT

This Court should issue the requested temporary restraining order and preliminary injunction because: (1) ESI has a likelihood of success on the merits; (2) unless enjoined,

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[2] The specialty pharmacy business in which ESI and MRD directly compete is described in Paragraph Nos. 6-19 of the Verified Complaint.

Defendants' conduct will inflict irreparable harm on ESI; (3) any harm Defendants may suffer if enjoined is outweighed by the irreparable harm ESI will suffer if injunctive relief is not granted; and (4) the public interest will not be harmed. *See Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013). As shown below, the evidence as to each of these elements supports granting the injunctive relief requested.

A. ESI Is Likely To Succeed On The Merits

ESI is likely to succeed on the merits on its claims because Lavin has breached his contractual restrictive covenants with ESI and MDR has tortiously interfered by inducing or causing such breach. In addition, Defendants have violated both the Defend Trade Secrets Act ("DTSA") and the Missouri Uniform Trade Secrets Act ("MUTSA"). Thus, as described further below, ESI is likely to succeed on its request for injunctive relief in order to enforce the Agreement and in order to protect the disclosure of its confidential information and trade secrets.

1. Lavin Has Breached The Agreement

During his employment with ESI, Lavin executed the Agreement, which is governed by Missouri law. (Ver. Complt. ¶¶ 36-37, and Ex. 1) The Agreement provides:

> 1. Nondisclosure of Confidential Information. During Employee's employment with the Company and at all times thereafter, Employee will not directly or indirectly, use or disclose the Company's Confidential Information to any person or entity . . . . Upon the termination of Employee's employment with the Company or at any other time that the Company may request, Employee shall promptly deliver to the Company all documents, memoranda, notes, records, data, computer programs, disks, data contained on hard drives or other computer medium, or reports (and all copies thereof) made or compiled by, delivered to, or otherwise acquired by Employee concerning, containing or embodying and Confidential Information. Employee acknowledges and agrees that all such materials are at all times the property of and belong to the Company and that Confidential Information could inevitably be disclosed by virtue of Employee's

employment in violation of Paragraph 2 below. Any such unauthorized disclosure or release of Confidential Information would irreparably harm the Company.

2. Noncompetition Agreement. Employee agrees that during the period of his or her employment with the Company and for a period of one (1) year immediately following termination of Employee's employment for any reason (the "Noncompete Period"), Employee will not engage in, or enter the employment of, perform services for, consult with or for, or have any direct or indirect interest in any other person, firm, corporation or other entity engaged in the business of, or about to become engaged in the business of, in the United States or Canada, or any other country in which the Company conducts business, (i) pharmacy benefit management, including without limitation mail order and specialty pharmacy services, specialty pharmaceutical distribution, prescription drug claim's processing or formulary development or administration, (ii) providing audit reviews or other consulting or advisory services with respect to any relationship between the Company and any third party, including its customers, vendors, suppliers and drug manufactures; or (iii) any other business in which the Company is engaged at the time Employee's employment with the Company terminates, *provided*, that this paragraph will apply only to those businesses described in clauses (i) and (iii) above in which Employee was employed or with respect to which Employee was involved at any time during his or her employment with the Company.

3. Non-Solicitation of Customers. Employee further agrees that for a period of one (1) year following termination of Employee's employment with the Company for any reason, Employee will not, directly or indirectly, (a) solicit, service, consult with or otherwise do business with any actual or prospective customer (as defined in this Agreement) relating to any business in which the Company is engaged and with respect to which Employee was involved at any time during his or her employment with the Company (b) provide services to any customer (as defined in this Agreement) that may, in any manner interfere with or disrupt any contractual or potential contractual relationship between any customer and the Company, or (c) otherwise cause or attempt to cause any actual or prospective customer (as defined in this Agreement), (i) to divert, terminate, limit or in any manner modify or fail to enter into any actual or potential business relationship with the Company, or (ii) to do business with any other person, firm,

> corporation or other entity which is engaged in the business or performs services similar to or competitive with those engaged in or provided by the Company.

(*Id.*). Lavin's employment with MDR violates all three provisions of the Agreement.

Under Missouri law, non-compete covenants are enforced if they are reasonable under the circumstances and their enforcement serves legitimate protectable interests. *Mayer Hoffman McCann, P.C. v. Barton*, 614 F.3d 893, 908 (8th Cir. 2010). The Agreement at issue is a narrowly-tailored effort by ESI to keep its information secret and retain competitive advantage, and it is more than adequately limited in scope.

Here, the Agreement is reasonable under the circumstances because Lavin was a high level and highly compensated National Sales Director at ESI and his noncompetition covenant limits his employment for only one year, which this Court has held is reasonable. *Panera, LLC v. Nettles*, No. 16-cv-1181-JAR, 2016 U.S. Dist. LEXIS 101473, *6 (Aug. 3, 2016) ("the non-competition agreement at issue limits [defendant's] employment for only one year, which is reasonable"). Indeed, Missouri courts have held that non-compete agreements with a restrictive time period much longer than a one-year restriction are reasonable. *See, e.g.*, *Alltype Fire Prot. Co. v. Mayfield*, 88 S.W.3d 120, 123 (Mo. App. 2002) (finding a two-year limitation on employment reasonable); *Church Mut. Ins. Co. v. Sands*, 2014 U.S. Dist. LEXIS 93303, at *9 (W.D. Mo. July 9, 2014) (holding a three-year non-compete agreement is enforceable).

Courts applying Missouri law also readily enforce geographical limitations that span nationwide. *See, e.g.*, *Sigma Chemical Co. v. Harris*, 586 F. Supp. 704, 710 (E.D. Mo. 1984) (enforcing two-year, worldwide limitation); *Superior Gearbox Co. v. Edwards*, 869 S.W.2d 239 (Mo. App. 1993) (enforcing a nationwide non-compete for five years).

Enforcing the Agreement also serves legitimate protectable interests. An employer has a legitimate protectable interest in its confidential and trade secret information (including customer lists), its customer relationships, and its goodwill. *Whelan Security Co. v. Kennebrew*, 379 S.W.3d 835 (Mo. 2012). The Missouri Supreme Court has recognized the employer's legitimate interest in customer contacts to "protect against 'the influence an employee acquires over his employer's customers through personal contact.'" *Whelan*, 379 S.W.3d at 842 (*quoting Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 611 (Mo. 2006)). As such, customer non-solicitation provisions in relation to customers whom the employee dealt with, such as the provision in the Agreement, is reasonable to protect the employer's interests and, as such, enforceable. *Whelan*, 379 S.W.3d at 844-45. For example, in *Mid-States Paint & Chemical Co. v. Herr*, 746 S.W.2d 613, 618 (Mo. App. 1988), the court affirmed the lower court's holding that access to customer lists, pricing information, and formula books warranted enforcement of a restrictive covenant for period of three years.

Likewise, in *Cape Mobile Home Mart, Inc. v. Mobley*, 780 S.W.2d 116, 117-19 (Mo. App. 1989), the court affirmed the lower court's finding that a restrictive covenant was enforceable where an employee possessed access to monthly and year-to-date sales and profit statistics, quarterly business and sales reports, a companywide operations and procedures manual listing employer policies and procedures, as well as customer lists. The court also noted that the employer advised employee that he would have access to a great deal of confidential information that he could not share.

Here, Lavin's continued access and use of ESI's confidential and proprietary information and trade secrets was robust, and – as set forth above – he was privy to ESI's most detailed confidential information and trade secrets regarding its customer relationships, customer contracts, and business strategies moving forward. Moreover, ESI's makes concerted efforts to keep the development of these systems and processes confidential by limiting access to these materials to a small group of high-level executives, all of whom sign non-compete agreements, and labeling highly-sensitive confidential documents as proprietary and confidential.

MDR fits squarely in the prohibited category of Paragraph 2(i)--*i.e.*: "pharmacy benefit management, including without limitation mail order and specialty pharmacy services, specialty pharmaceutical distribution, prescription drug claim's processing or formulary development or administration"--as that is the business line in which he worked for ESI. The restriction supports ESI's legitimate business interests in protecting its confidential information and trade secrets, its goodwill, and it customer relationships.

2. ESI Is Likely To Succeed On Its Claim For Tortious Interference With Contract

"The elements of a claim for tortious interference with contract are: (1) a contract; (2) defendant's knowledge of the contract; (3) intentional interference by the defendant inducing or causing a breach of the contract; (4) absence of justification; and (5) damages resulting from defendant's conduct." *Howard v. Youngman*, 81 S.W.3d 101, 112-113 (Mo. App. 2002). ESI satisfies each.

First, as established above, Lavin breached the Agreement. By accepting a job with MDR, ESI's direct competitor in the specialty pharmacy business related to fertility, Lavin has expressly breached the noncompetition provision of the Agreement.

Second and third, MDR was clearly aware of the Agreement. Lavin told his supervisor so. Lavin said that, not only was MDR aware of the Agreement, but it crafted a job description to be as broad and general as possible in order to circumvent any issues with respect to Lavin's obligations under the Agreement. (Ver. Complt. ¶¶ 41-43) Thus, MDR intentionally interfered to cause the breach of the Agreement. Moreover, Lavin asked ESI to release him from his obligations under the Agreement so that he could work for MDR. ESI refused. Lavin resigned anyway and MDR began employing despite its knowledge of the Agreement and the refusal to release the restrictions. There is simply no justifying such tortious behavior, especially where MDR seeks to put Lavin in a position where he will necessarily be required to use the confidential information and trade secrets he learned at ESI.

3. Defendants Have Violated the Federal Defend Trade Secrets Act and the Missouri Uniform Trade Secrets Act

The DTSA defines "trade secret" as:

> all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—
>
> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

18 U.S.C. § 1839(3). The definition of "trade secret" under the MUTSA is substantially the same. *See* Mo. Rev. Stat §417.453(4). ESI has established the information possessed by Lavin constitutes "trade secrets" under the statutes, and that Lavin has actually misappropriated or threatens to misappropriate them.

Here, Lavin has created, contributed to the creation of, and been privy to a host of confidential information and trade secrets, including: the names of and specific contacts at ESI's customers and potential customers; all contracts between ESI and its customers, along with the terms of those contracts; customer feedback and opinions (positive and negative) with respect to ESI's products and services, as well as their contract history and status; marketing plans, including new products in development; and the pricing and profit margins of ESI's products. As National Sales Director, Lavin was privy to weekly, monthly and annual volume reports, strategic planning reports, which contain such information. (Ver. Complt. ¶¶ 23-27)

ESI's confidential contract and customer information, including the identity of customers and potential customers, the terms of contracts, the reimbursement schedules and rates for such contracts, marketing plans, and new products in development provide independent economic value to ESI and clearly fall within the definition of trade secrets.

ESI undertakes reasonable measures to keep confidential and secret its confidential contract and customer information, including the identity of customers and potential customers, the terms of contracts, the reimbursement schedules and rates of the contracts, marketing plans, and new products in development. For example, ESI requires employees to sign nondisclosure, nonsolicitation and noncompetition agreements, as Lavin did. In addition, documents generally are password protected and contain "confidential" legends, and ESI conducts security monitoring of external e-mails and document transfers. ESI gains a benefit from having its confidential information and trade secrets remain unknown outside ESI. Conversely, its competitors, such as MDR, would profit at ESI's expense from knowing such information and trade secrets.

Moreover, if Lavin is permitted to work at MDR, his use and disclosure of the trade secrets are inevitable. This is so because (1) the nature of his responsibilities at MDR are akin to those he held for ESI and require his consideration of ESI's trade secrets in the faithful performance of those responsibilities, and (2) Lavin's actions, and the obfuscation engaged in by

Lavin and MDR since Lavin first announced his intent to accept the position at MDR (including the manufacturing of the job description specifically to avoid Lavin's obligations under the Agreement), demonstrate a lack of candor (to put it generously) and an unwillingness to preserve confidentiality on the part of Lavin and MDR. *See H&R Block Eastern Tax Services, Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1074-75 (W.D. Mo. 2000). Such threatened misappropriations also can be enjoined. Mo. Rev. Stat §417.455.1.

Lavin will have decision-making authority in his job at MDR; his responsibilities will be similar to those he held with ESI; his ESI position required his use of ESI's trade secrets and so will his job at MDR; Lavin developed, or contributed to the development of, the ESI trade secrets at issue; and the nature of the trade secrets Lavin possesses are easily subject to memorization. *See H&R Block Eastern Tax Services*, 122 F. Supp. 2d at 1075.

B. ESI Will Suffer Irreparable Harm Absent An Injunction

Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages. *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). "The mere violation of a valid non-compete agreement can support an inference of the existence of a threat of irreparable harm." *Church Mut. Ins. Co. v. Sands*, 2014 U.S. Dist. LEXIS 110953, at *7 (W.D. Mo. Aug. 11, 2014).

Moreover, "[c]ourts regularly find irreparable harm where a non-compete agreement states that it breach constitutes irreparable injury." *Nettles*, 2016 U.S. Dist. LEXIS, *10-11. Such is the case here. Lavin agreed that "the breach of any provision of this Agreement shall result in irreparable injury and damage to the Company, that there is no adequate remedy at law for such breach, and that the Company should be entitled to specific performance, injunctive relief and other equitable remedies in addition to any remedies provided by law, together with the Company's attorney's fees and costs." (Ver. Compl. ¶¶ 36-37, and Ex. 1 at ¶ 11); *see also*

Systematic Business Services, Inc. v. Bratten, 162 S.W.3d 41, 51 (Mo. Ct. App. 2005) (where the restrictive covenant is valid and the former employee has an opportunity to influence his former employer's customers, actual damages are not necessary to obtain permanent injunctive relief).

By virtue of his position with ESI, Lavin was privy to substantial confidential and trade secret information directly affecting ESI's actual and prospective customer relationships. At MDR, he would be uniquely positioned to unfairly and unlawfully compete against ESI. His employment as Executive Director of Customer Success at MDR is likely to draw upon, as a matter of course, his experience and knowledge with regard to ESI's confidential customer relationships information and business strategy. Unless Defendants are enjoined as requested by ESI, they will inflict irreparable harm on ESI through the use and disclosure of ESI's confidential information and trade secrets. In addition, Lavin's conduct to date in combination with the obfuscation engaged in by MDR in the drafting of his job description, reflect that they will continue to violate ESI's statutory and contractual rights unless enjoined from doing so.

As recently acknowledged by this Court, while Missouri has not formally adopted the doctrine of inevitable disclosure, the Court found the rationale underpinning the theory helpful in understanding how a former employee's performance in his new role would "almost certainly require him to draw upon and use trade secrets and the confidential strategic planning to which he was privy." *Nettles*, 2016 U.S. Dist. LEXIS, *11-12. This Court then held that the disclosure of confidential information such as business strategy would result in irreparable harm to the former employer, and the Court agreed that the employee's employment with the new employer was likely to lead to such disclosure. *Id.*

This Court went on to hold that, even without relying on such inevitable disclosure, where the irreparable harm includes not only the divulgence of trade secrets, but also the violation of a binding non-competition agreement, the remedy at law is inadequate because such damages would be difficult if not impossible to measure. *Id.* at *12. The Court also found it significant that the employee had agreed, as Lavin did here, that his breach would constitute irreparable harm. Simply put, ESI has demonstrated that, absent injunctive relief, it has suffered and will continue to suffer irreparable harm.

C. The Harm To Defendants Is Comparatively Slight

In contrast to the irreparable harm that ESI will suffer if injunctive relief is not granted, Defendants will suffer comparatively slight harm. Lavin accepted employment with MDR after being told by ESI that doing so would violate his Agreement because MDR is a direct competitor of ESI in the fertility specialty pharmacy business, a narrow and competitive industry. While Lavin will not be permitted to immediately join MDR, he remains free to obtain other employment that calls for his general management and/or sales skills. Lavin's supervisor even told him that Lavin was free to seek employment in the fertility industry, but he could not work for a competitor in the specialty pharmacy business, as MDR clearly is. Thus, the harm that ESI has suffered, and will continue to suffer absent an injunction, outweighs any harm that may befall Defendants if his unlawful actions are enjoined.

D. The Public Interest Will Not Be Harmed

Balancing the equities favors granting ESI's motion for injunctive relief. Enjoining Defendants from violating federal and Missouri statutes and ESI's contractual rights will not harm the public, as it will continue to have access to MDR's (and other competitors') products and services. Conversely, denying injunctive relief will cause ESI irreparable harm, undermine the enforcement of Missouri statutes, deny ESI the benefit of its bargain with Lavin, and cost ESI business and clients that it would not have lost but for Defendants' violations of ESI's rights.

Moreover, parties should be able to rely on each other to comply with their agreements and should be able to rely on the courts to enforce agreements when they are breached. The public interest thus weighs in favor of enjoining Lavin as requested by ESI.

CONCLUSION

For the foregoing reasons, ESI respectfully requests that this Court grant its motion and enter the proposed Temporary Restraining Order against Defendants until such time as the Court can convene an evidentiary hearing on ESI's request for a preliminary injunction.

Respectfully submitted this 5th day of May, 2017.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 5, 2017, the foregoing document was filed using the Court's CM/ECF system and was served, via email, on counsel for Defendants:

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